SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 924

WABASH VALLEY COACH CO.,

Petitioner,

vs.

GERTRUDE B. SALE, AS PRESIDENT OF WABASH VALLEY COACH CO., BURWELL W. SALE, AS SECRETARY-TREASURER OF WABASH VALLEY COACH CO., GERTRUDE B. SALE AND BURWELL W. SALE AND CHARLES A. TURNER.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Jurisdiction.

This court had jurisdiction of the Petition for a Writ of Certiorari to review the judgment of the State Supreme Court under Section 237 (b) of the Judicial Code (28 U. S. C. A., Section 344 (b).

The judgment of the Supreme Court of Indiana striking out this petitioner's claim of right (its Verified Motion to Dismiss the Appeal) and reversing the judgment of the

trial court with instructions to restate its conclusions of law in conformity with the opinion and to enter judgment for the defendant was rendered on January 14, 1943. A petition for rehearing was seasonably filed, considered by the court and overruled without the rendition of a further opinion on February 2, 1943, and accordingly a mandate was issued to the trial court in conformity with the opinion February 16th, 1943. The judgment reversed was recovered in the stockholder's derivative suit wherein Charles A. Turner, respondent herein, was plaintiff in the trial court and appellee in the State Supreme Court, said petitioner being under the doctrine underlying such suits prevailing in Indiana as elsewhere, was the beneficiary of the judgment reversed, and a necessary party to said suit, being named as co-defendant with its then officers, Gertrude B. Sale and Burwell W. Sale against whom said judgment was recovered and enforceable cancelling certain of its capital stock and ordering the same surrendered to the corporation (this petitioner). Necessarily the petitioner was a party adverse in interest to its co-defendants against whom said judgment was recovered and entitled in its own right to notice of the appeal as required by the statutes of Indiana (which was not given to it) and entitled to defend in its own right against the reversal of the judgment of which it was the real beneficiary. It was a necessary party to the action of the trial court and a necessary party in interest to the proceeding to reverse the judgment on appeal.

This judgment striking out this Petitioner's claim of right based upon and derived from Section 1 of the Fourteenth Amendment of the Constitution of the United States, being in form Petitioner's Special Appearance and Verified Motion to Dismiss the Appeal, necessarily denied and ruled against the said claim of right therein specially set up and specifically asserted to be based upon and derived from said constitutional provision.

This claim of right was that the petitioner was entitled to appear and be bound in the appeal proceedings only by attorneys of its own selection; that it was entitled not to be held to appear and be bound by the dual legal representation purporting to file the assignment of errors below, seeking to reverse the judgment of which under the Indiana decisions it was the beneficiary, when said legal representatives were selected by its adversaries in interest against whom the judgment was recovered and enforceable and who in breach of their trust as officers of the petitioner were acting against its interest in lodging the appeal and in using the same counsel to appear both for petitioner and themselves; and further that it was entitled to notice, as an adverse party, of the taking of the appeal accorded by the Indiana statutes to all persons adverse in interest to appellants and which was indispensable to vest the Supreme Court with jurisdiction of the "vacation appeal," as acknowledged in the opinion of the court below; that it was denied due process of law and the equal protection of the laws by being refused the said notice and by the court proceeding coram non judice to reverse the judgment of the trial court, the petitioner not having been made a party to the appeal proceeding except through the void dual representation.

Hansberry v. *Lee* (1940) 311 U. S. 32, 45, 46;
Glasser v. *United States* (1942) 315 U. S. 60, 76.

The court below avoided mention of any constitutional question but the constitutional claims of petitioner were necessarily denied since the pleading presenting them were struck out on the clearly inadequate and untenable ground that the petitioner was only "a nominal party" and that the final judgment of the trial court forever prohibited stockholders' meetings and consequently the corporation was unable to procure and authorize the counsel presenting

its constitutional claims to appear for it. These questions were necessarily interwoven with the assertion and determination of the constitutional claims. The denial of these claims was not based on any infirmity in procedure or practice. All these questions are, of course, none-the-less for the exclusive determination of this court as is also necessarily the question of the priority of the constitutional claims proper.

II.

Summary of the Case.

Summarily put: The respondent, Charles A. Turner, a stockholder of the petitioner, brought a stockholder's derivative suit to cancel certain shares of common stock of the petitioner, Wabash Valley Coach Co., alleged to have been illegally issued in violation of the statute law, and also to enjoin the holders thereof, the respondents, Burwell W. Sale and Gertrude B. Sale, individually, and as Secretary and President of said corporation, who were at the time the majority stockholders of this petitioner corporation and also the majority of its Board of Directors, from issuing and selling any unissued stock of the corporation for less than par, such sale being inhibited by the applicable statutes. The Wabash Valley Coach Co. was made a party defendant. A judgment was rendered in favor of the appellee below, Charles A. Turner, cancelling as invalid 108.77 shares of the stock in question, and enjoining further sale of stock for less than par, said judgment being for the benefit of petitioner.

An appeal was taken after the term in which the judgment was rendered expired. The assignment of errors was made out in the name of the petitioner, Wabash Valley Coach Co., as an appellant, although it was the party for whose benefit the judgment was obtained and also in the

names of the other losing parties as appellant, the said Sales, individually and as President and Secretary respectively.

No notice was given to the petitioner corporation. The joinder of the petitioner as an appellant against its interest was accomplished through the same attorneys who acted for and were selected by the adversaries of the corporation, the said Sales, who were then the executive officers of the company.

At the next regular annual stockholders' meeting on August 17, 1942, new officers were chosen for the corporation, who selected other counsel for the corporation, who thereafter filed the Special Appearance and Verified Motion To Dismiss the Appeal, setting up the corporation's claim of right under Section 1 of the Fourteenth Amendment of the Federal Constitution to be bound only by counsel of its own free selection and not to be bound by counsel selected by and acting for its adversaries, and contending that the lodging of the appeal was void, and that the Supreme Court of Indiana had no jurisdiction.

The specific claims of constitutional right made in the Supreme Court of Indiana, after the corporation was free from the control of its adversaries are set out in Appendix C of the Petition above, and are described generally in the petition proper, supra, page 8. In the Reasons for the Allowance for the Writ in the Petition, supra, page 18 are set forth the errors assigned in this court in relation to the constitutional right and claim of the petitioner. The State Supreme Court struck out the Motion setting up the Petitioner's claim of constitutional right.

The opinion of the Court did not mention the constitutional claims or any Federal question but decided the case upon the grounds necessarily implicit and inherent in the presentation and determination of the Federal Constitu-

tional questions which are not tenable or adequate or independent non-Federal grounds, constituting in fact mere pretexts to evade the determination of the constitutional question in terms. Of course the ruling of the court in effect necessarily denied these claims.

III.

Summary of Argument.

(1) The petitioner was not notified of the taking of the vacation appeal from the judgment of the trial court required by the pertinent statutes and rules of court to vest jurisdiction in the Supreme Court of Indiana. The case for jurisdiction turns on the challenged validity of the appeal filed in the petitioner's name by and through dual representation which invalidated the appeal under *Hansberry* v. *Lee* (1940) 311 U. S. 32, 45, 46; *Glasser* v. *United States* (1942) 315 U. S. 60, 76, and analogous cases.

(2) The petitioner was an indispensable party to the said appeal and had substantial interest in the judgment rendered by the trial court under the doctrine of the stockholder's derivative suits prevailing in Indiana as elsewhere as the real beneficiary of the judgment. *Carter* v. *The Ford Plate Glass Co.* (1882) 85 Ind. 180, 182; *Davenport* v. *Dows* (1873) 18 Wall. 626, 627; Pomeroy Equity Jur., Section 1095, Vol. 4, p. 276; *Department of Treasury* v. *Crowder* (1941) 214 Ind. 252; *Crimmins etc. Co. et al.* v. *Kidder Peabody Acc. Corp.*, 46 al. (1933) 282 Mass. 267, 270, 271, 4 Fletcher Cyc. Corporations, (1932 Ed.) page 33, Section 5083, note 73. Other citations and discussion in Argument, pages 46-47, below.

(3) Under the laws of Indiana the executive officers of a corporation sustain a fiduciary relationship toward it, and in this instance the respondents, the two Sales, were at the time of the lodging of the appeal the executive officers of the corporation and their act in selecting counsel to procure a reversal of the judgment, also to act and to join the petitioner as an appellant was a contributing factor in vitiating the appeal for want of due process, said officers being the defendants against whom the judgment was recoverable and enforceable. This conduct lacks the elements of fair play.

(a) As to fiduciary relationships:

Wainwright v. *P. H. etc. Roots Co.* (1921) 176 Ind. 682;

Port et al. v. *Russell et al.*, 36 Ind. 60, 65, 66;

Pepper v. *Lytton* (1939) 308 U. S. 295, 306;

Meinhard v. *Salmon* (1928) 249 N. Y. 458;

For other authorities and discussion see Argument, page 49 below.

(b) As to litigation where trustee and *cestui* are opposed in interest:

Groninger v. *Fletcher Trust Co.* (1942) 41 N. E. 140, 141, 142 — Ind. — (not yet in official report)

For other cases and discussion see Argument, pages 44, 47-48, below.

(c) Unauthorized appearance constituting lack of due process under cases decided in this court:

National Exchange Bank v. *Wiley* (1904) 195 U. S. 257, 270 (49 L. Ed. 184, 190);

Hall v. *Lanning* (1875) 91 U. S. 160, 169, 170 (23 L. Ed. 271, 274, 275);

For other authorities and discussions see Argument, page 48 below.

4. Under the Indiana Appeal System the party against whom judgment is recovered appealing therefrom must give notice to a co-defendant who is adverse in interest to him. Section 2-3214 BRS 1933, Rules of Supreme Court—2-1, 2-2, 2-3, 2-30 in Appendix A supra. *Buchanan* v. *Morris* (1926) 181 Ind. 385.

5. Under the Indiana Appeal System the party in whose favor the judgment is rendered may not appeal and an appeal may not be taken to determine costs only. *Clark et al.* v. *Stout* (1914) 183 Ind. 329; *Kaiser et al.* v. *Portage* (1929) 198 Wis. 581; *Wyss* v. *Eskay Dairy Co.* (1934) 99 Ind. App. 620; other authorities and discussion in Argument, page 51, below.

6. The *de facto* doctrine prevails in Indiana with reference to both public officers and officers of private corporations, whose title may not be collaterally attacked and who have power to bind the corporation for whom they act; and one having color of title or a certificate of election together with possession is a *de facto* officer, which was the situation of the officers of the petitioner, there being no competent evidence in the State Supreme Court denying these facts, and the court itself not finding any fact to the contrary against the petitioner. Consequently the newly chosen counsel presenting this petitioner's claim of constitutional right was vested with authority so to do and likewise is vested with authority to file and present the petition for a writ of certiorari on its behalf. *Rule* v. *State* (1935) 207 Ind. 546; *State ex rel. Johnson* (1937) 211 Ind. 327; *Smith* v. *Bank* (1862) 18 Ind. 327; Cases collected in Petition for Writ, p. 11, above, as to what affidavits are competent evidence. Discussion in Argument, page 56, below.

7. The holding of the Supreme Court that the petitioner was only a "nominal party" and without interest in the

judgment below is ill-founded and untenable. This holding was a mere pretext to evade the decision in terms of the constitutional question, which however was necessarily decided by the State Supreme Court in striking out the pleading expressly presenting the claims. The question of the interest of the petitioner is implicit in the assertion and determination of the constitutional question raised by the petitioner and open to review in this court. As to interest see citations under 2 above in this Summary; as to province of this court in determining this question: *Union P. R. Co.* v. *Public Service Commission* (1918), 248 U. S. 67, 70; *Leathe* v. *Thomas* (1907), 207 U. S. 93, 99, and other cases cited above in Petition p. 14.

8. Likewise the holding of the court below that the terms of the final injunction forever interdicted all future stockholders' meetings of the petitioner was unsubstantial and untenable, constituting only a pretext or evasion and subject to the further observations made in 7 above in this summary. See Discussion and Authorities pages 53-55 in Argument below.

9. The appeal proceedings below being *coram non judice* did not constitute due process of law. *Scott* v. *McNeal* (1894), 154 U. S. 34, 46.

Argument.

The opinion of the Indiana Supreme Court acknowledges that the proceedings before it were a "vacation appeal." "Vacation Appeals" fall under Sections 2-3206, 2-3213 and 2-3214 B. Ind. Stat. Ann. (1933), requiring notice to all parties not joining, whether co-parties or adverse parties. No notice was given the Wabash Valley Coach Co.

The court held that notice was dispensed with because the petitioner had joined in the appeal through the agency of the same counsel who also represented the respondents,

Burwell W. Sale and Gertrude B. Sale. The case for jurisdiction below turns entirely upon the validity of this agency or representation, as against the claim of constitutional right of this petitioner. The petitioner contends that this dual representation offends against due process of law and the equal protection of the laws under the Fourteenth Amendment, and the lodging of the appeal was void, and consequently the court had no jurisdiction.

The petitioner relies on *Hansberry* v. *Lee* (1940) 311 U. S. 32, 45, 46 (85 L. Ed. 22, 28, 29) and *Glasser* v. *United States* (1942) 315 U. S. 60, 76 (86 L. Ed. 680, 702).

The *Hansberry* case had to do with the validity of a decree obtained in a class suit, where the members suing had a contingent substantial interest "not necessarily or even probably the same as those whom they are deemed to represent." This Court denied the validity of the decree as to the members thus represented, "because of the dual and potentially conflicting interest between the absent parties and those seeking to represent them."

To the same effect is the holding in *Glasser* v. *United States* (1942) 315 U. S. 69, 76 (86 L. Ed. 680, 702). The court held that due process was denied where counsel were required "to concurrently represent interests which might diverge from the party represented by the attorney, when the possibility of that divergence is brought home to the court."

The test applied in each of these cases required only a possibility or contingency of conflict of interest in order to void the dual representation and deny due process. This petitioner urges that the present case is ruled by these decisions, but that the dual representation here assailed presents even a clearer and more pronounced instance of the same constitutional infirmity. In this case it is not merely a possible or contingent but an actual visible conflict of in-

terest. The representation here is vitiated not merely because it is dual but because it is effected through a breach of fiduciary duty to the petitioner; and, the petitioner being benefited by the judgment was incapable of appealing therefrom.

The principles underlying a stockholder's suit and the fiduciary relationship of the executive officers of the corporation toward the corporation are established in Indiana in common with the Nation at large.

The rationale of stockholder's suits set out in Pomeroy Equity Jurisprudence, Section 1095, Vol. 4, p. 276 (Present Ed), stated as follows:

> "But it is absolutely indispensable that the corporation itself should be joined as a party—usually as a co-defendant. The *rationale* of this rule should not be misapprehended. The stockholder does not bring such a suit because *his* rights have been directly violated, or because the cause of action is *his,* or because *he* is entitled to the relief sought; he is permitted to sue simply *in order to set in motion the judicial machinery of the court.* The stockholder, either individually or as the representative of the class, may commence the suit, and may prosecute it to judgment; but in every other respect the action is the ordinary one brought by the corporation, it is maintained directly for the benefit of the corporation, and the final relief, when obtained belongs to the corporation, and not to the stockholder plaintiff. The corporation is therefore an indispensably necessary party, not simply on the general principles of equity pleading that it be bound by the decree, but in order that the relief, when granted, may be awarded to it, as a party to the record, by the decree. This view completely answers the objections which are sometimes raised in suits of this class, that the plaintiff has no such direct interest in the subject matter nor in the relief. In fact the plaintiff has no such direct interest; the corporation alone has a direct interest; the plaintiff is permitted notwithstanding his want of interest to

maintain the action solely to prevent an otherwise complete failure of justice."

This statement of Pomeroy appearing also in earlier editions is approved and followed in *Tevis* v. *Hammersmith* (1903), 31 Ind. App. 281, 283, 284.

In *Carter* v. *The Ford Plate Glass Co.* (1882), 85 Ind. 180, 182, the Supreme Court of Indiana said:

> "The only theory upon which appellants are allowed to maintain this action is, that the Ford Plate Glass Company, whose duty it was to bring and prosecute the suit, was in the hands of its enemies, and therefore could not sue. For that reason, the appellants, being stockholders of the alleged defrauded company, are allowed to sue, the company being the real beneficiary if the suit is successful."

The Carter case is specifically based upon the holding of *Davenport* v. *Dows* (1873), 85 U. S. 626, 627, where among other things, speaking of these suits, it is said:

> "This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation and not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it."

Davenport v. *Dows* is followed by *Porter* v. *Sabin* (1893), 149 U. S. 473, 478, 479:

> "The right to maintain a suit against the officers of a corporation for fraudulent misappropriation of its property is a right of the corporation; and it is only where the corporation will not bring the suit, that it can be brought by one or more stockholders in behalf of all. *Hawes* v. *Oakland*, 104 U. S. 450 (26 L. Ed. 827). The suit is still a suit to enforce a right of the corporation; and the corporation is a necessary party, in order that it may be barred by the judgment."

It has been uniformly held that the corporation is an indispensable party in these suits. As said in *Philipbar et al.* v. *Darby et al.* (1936), 85 Fed. (2d) 27, 30 (C. C. A. 2):

> "It has been the law for over sixty years that the corporation is an indispensable party in such cases."

Sometimes it is said that the corporation is an indispensable party for the reason that it is necessary to bind it by the decree, as in the Philipbar case, *supra,* but in Pomeroy, quoted above and followed in the Indiana cases *supra,* states the reason to be—

> "not simply on the general principles of equity pleading that it be bound by decree but *in order that the relief, when granted, may be awarded to it, as a party to the record, by the decree.*" (Our italics.)

These cases clearly establish that the interest of the respondents, the Sales, against whom recovery was had for the benefit of the corporation both as to the surrendering and the cancellation of their stock, which meant the return of the stock to the control and further issue by the corporation, and as to the injunction against the issue to them of further stock for less than par, was in conflict with the interest of the corporation. Consequently the vice of dual representation falls directly within *Hansberry* v. *Lee* and *Glasser* v. *United States, supra.*

The present instance is so clear that there was even imposed upon the court itself the duty to supply "corrective process where due process of law had been denied." *Brown* v. *Mississippi* (1936), 297 U. S. 278, 286, 287 (90 L. Ed. 682, 687). If no one else sought to rescue the corporation from the hardships of hostile representation, the court itself was called on to do so. In *Groninger* v. *Fletcher Trust Co.* (1942), 41 N. E. 140, 141, 142 (Ind.) (Official Report unpublished), the court observed:

> *"In such cases, of course, neither the fiduciary nor the attorney for the fiduciary should act for the trust, and courts will see that in such cases disinterested persons are appointed to represent the trust."* (Our italics.)

Linebaugh v. Atwater et al. (1898), 173 Ill. 613 (50 N. E. 1004, 1006); *Peoples Bank Co.* v. *Gregory* (1932), 347 Ill. 397 (179 N. E. 856); *Ambos* v. *Glos* (1924), 314 Ill. 438 (145 N. E. 639, 641). Unauthorized appearance of attorney for a defendant produces lack of due process, and a judgment rendered on such appearance is a nullity.

National Exchange Bank v. *Wiley* (1904), 195 U. S. 257, 270 (49 L. Ed. 184, 190); *Hall* v. *Lanning* (1875), 91 U. S. 160, 169, 170 (23 L. Ed. 271, 274, 275); *Shelton* v. *Teflin et al.* (1848), 6 How. 163, 186 (12 L. Ed. 158, 167).

It was not controverted that the dual counsel representation "was obtained in part through the resources and credit of the corporation" (this petitioner) (R. 65), as to effect of which see: *Wilson* v. *The State* (1861), 16 Ind. 392, 395; *Bowman* v. *Bowman* (1899), 153 Ind. 498, 507; *Logan* v. *Logan* (1932), 97 Ind. App. 209 (180 N. E. 32, 34).

In this case the action of counsel for this petitioner selected by the respondents, Sale and Sale, was not merely "rather pro forma than zealous and active" for the corporation as in *Powell* v. *Alabama* (1932), 287 U. S. 45, 48 (77 L. Ed. 158, 165); it was vigorously hostile to the corporation, seeking to reverse a judgment of which it was the beneficiary.

The vice of representation by adverse interests is aggravated in this case because the petitioner's adversaries presuming to represent it were, at that time, also its trustees, namely its executive corporate officers. "Their powers are in trust, the burden is on the director or majority stockholder not only to show good faith of the transaction but also to show its inherent fairness," and the officers "can

not violate the rules of fair play" • • • "can not use his power to his personal advantage but to the detriment of the corporation," • • • "no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements." "Where there is violation of these principles, equity will undo the wrong or intervene to prevent its consummation."

Pepper v. *Lytton* (1939), 308 U. S. 295, 306, 311; *Port et al.* v. *Russell et al.*, 36 Ind. 60, 65, 66; *Zaring* v. *Kelly* (1920), 74 Ind. App. 581, 583 (128 N. E. 657, 658); *Schemmel* v. *Hill* (1930), 91 Ind. App. 373, 383, 385 (169 N. E. 678, 681 682); *Wainright* v. *P. H. & F. M. Roots Co.* (1921), 176 Ind. 682 (97 N. E. 8, 11, 12); *Twin-Lick Oil Co. v. Marbury* (1875), 91 U. S. 587, 588 (23 L. Ed. 328); *Washburn* v. *Green* (1890), 133 U. S. 30, 43 (33 L. Ed. 516, 521). (See also Justice Cardozo's famous opinion in *Meinhard* v. *Salmon* (1928), 249 N. Y. 458 as to the high standard of conduct required of trustees.)

Such practices are not fair play, and when they occur in judicial proceedings they are not tolerated because due process of law forbids, since due process of law is the embodiment of the standards of fair play. *MacDonald* v. *Maybee* (1917), 243 U. S. 90, 91; *Chambers* v. *State* (1940), 309 U. S. 227, 236, 237; *Millikin* v. *State* (1940), 311 U. S. 457, 463; *Mooney* v. *Holohan* (1934), 294 U. S. 103, 112, 113 (79 L. Ed. 791, 794); Dual representation resting on breach of trust should succumb to the same infirmity.

The petitioner under *Carter* v. *The Ford Plate Glass Co.*, supra, and other authorities cited was benefited by the judgment. No judicial fiat could convert it into an appellant from such a judgment. *Clark et al.* v. *Stout* (1914), 183 Ind. 329 (105 N. E. 567); *Kaiser et al.* v. *Portage* (1929), 198 Wis. 581, 582 (225 N. W. 188); *Cantor et al.* v. *Sachs et al.*, 18 Del. Ch. 359, 365, 366, where the court said speaking of a derivative stockholder's bill—

> "Any recovery granted by the decree is necessarily in favor of the corporation."

This accords with Pomeroy's views quoted above, and the compelling reason for joining the corporation initially is not only that it may be barred—

> "but in order that the relief, when granted, may be awarded to it, as a party to the record, by the decree."

The relationship created between a corporation and its stockholders by the issue of stock is contractual. *Fletcher Cyclopedia Corporations* (1932), Section 5083, page 33, Vol. 4, Note 73; *Kennedy* v. *Central Power Co.* (1941), 129 Neb. 637 (226 N. W. 504); *Schroeter* v. *Bartlett Syndicate Building Corporation* (1942), — Cal. App. —, 55 P. (2d) 1221; *Crimmins & Peirce Co. et al.* v. *Kidder Peabody Acceptance Corporation et al.* (1933), 282 Mass. 367 (185 N. E. 383, 388); *Department of Treasury of Indiana* v. *Crowder* (1941), 214 Ind. 252 (15 N. E. (2d) 89) recognize the contractual nature of capital stock outstanding and that it is a contingent liability of the corporation to the holder. The suit for the cancellation of the issue of this petitioner's stock to the respondents, the Sales, was in essence a suit for the cancellation of its contract, which required its presence in court. *Shields* v. *Barrow* (1856), 17 How. 139, 141.

But the corporation had also another substantial interest in the judgment, namely, the permanent injunction against the sale of unissued stock for less than par to the two Sales, who were seeking to annul this injunction by reversal. The double interest of the corporation in maintaining the judgment is clear. We submit that it was an indispensable party to the appeal and that its interest was adverse to its fiduciaries who attempted to act for it against its interest.

Thus it is completely demonstrated—First, that the holding of the court below that the corporation petitioner "was only a nominal party" and had no interest is completely unfounded; Second, that under *Pepper* v. *Lytton*, supra, and the Indiana cases supra, declaring the invalidating effect of the fiduciary relationship upon actions by a trustee for his own benefit but injurious to his beneficiary, the holding by the Supreme Court of Indiana, that the lodging of the appeal was valid because it was accomplished by persons who at the time of the lodging were its officers, is without merit and does not reach the contention of this petitioner that such actions were void because they were a violation of the principles above set out, and that the power of the offices, as noted by Mr. Justice Douglas in the court's opinion in *Pepper* v. *Lytton, supra,* itself is subject to the limitation that it can not be used for his own benefit to the detriment of his *cestui,* the corporation itself.

Certainly the corporation could not appeal so that the relief granted it below should not be awarded to it.

The mere circumstance that a formal judgment was rendered against the petitioner for costs does not create an appealable interest in it.—"This Court will not entertain an appeal for the sole purpose of determining who shall pay the cost." *Wyss* v. *Eskay Dairy Co.* (1934), 99 Ind. App. 620, 622, 623; to the same effect are: *Stauffer* v. *Salimonie, etc. Co.* (1896), 147 Ind. 71, 73; *Manlove* v. *State* (1899), 153 Ind. 80, 81; *Winfield* v. *McCaslin* (1917), 86 Ind. 307, 309.

In this case the officers of the corporation against whom the judgment was recovered undertook by an affirmative act in the name of the corporation, to destroy the benefit of that judgment to their corporation. An appeal is an affirmative act. An assignment of errors upon appeal in Indiana is in the nature of a complaint in the Supreme Court. *Steel* v. *Yoder* (1915) 58 Ind. App. 633 (108 N. E.

783); and *Crumpacker et al.* v. *Manhatten Lumber Co. et al.* (1916) 185 Ind. 493, 494 (112 N. E. 525).

It was the duty of these officers toward the petitioner to resist the reversal of the judgment. The right of the petitioner to resist reversal is not based on statute, but on its constitutional right after term expired to notice and to a hearing in order to defend its property rights, secured to it by such judgment, *Wetmore* v. *Karrick* (1907), 205 U. S. 144, just the same as it is entitled to notice if an ordinary civil action is brought against it.

The then officers of the corporation undertook to purloin the right of the corporation to defend against reversal by using it as an appellant, and it was a Federal Constitutional right which they thereby sought to stifle. Their action was a void waiver of the corporation's constitutional right to notice and to defend. This case is more extreme than even *Johnson* v. *Zerbst* (1937) 304 U. S. 458, 463, 464 for there the question was whether the accused himself had waived his constitutional right but here the corporation was even more helpless than a prisoner at the time the appeal was taken.

Section 2-3214, BRS—1933, does indeed indulge an incorrect designation in the assignment of errors of parties as appellants or appellees, so that an erroneous designation is no longer fatal as formerly, but it does not dispense with notice to a party who is adverse to the appellant, although such party is erroneously designated. For the statute expressly declares:

> "Provided, however, That when notice of such appeal is required to give the court jurisdiction over the appellees or the coparties not appealing, notice shall be served on such coparties in the same manner as is now or may hereafter be required to be given appellees."

The Rules of the Supreme Court do not change the requirements of this Statute, but recognize them. See Rule 2-1, 2-2, 2-3, 2-30 in Appendix.

The holding, or rather intimation, of the court made as the basis for striking out Petitioner's Motion to Dismiss the Appeal, that the permanent injunction forbid all future stockholders' meetings is a transparent fallacy. We quote the text of the temporary injunction itself, which runs:

> "It Is Therefore Ordered, Adjudged and Decreed by the court that a temporary injunction be and is granted as prayed by the plaintiff in his petition, in full force and effect, and that said temporary injunction be and is granted under promise and providing that no meetings of the stockholders herein are held; all until the further order of this court." (R. 2).

The condition upon which the temporary injunction was to be granted was met since the court recites that it

> "is granted under promise and providing that no meetings of the stockholders therein are held; all until the further order of this court."

It is obvious that the reference to no meetings being held was not an order but merely a recital of *modus vivendi* reached by agreement of the parties while the case was *in fieri* below.

We quote Conclusion of Law No. 4:

> "The temporary injunction heretofore granted should be made permanent and continued in full force and effect." (R. 26).

We find here no reference to any promise but the final injunction is awarded as the stark sentence of the law, free from any condition or promise. The occasion for *modus vivendi* had passed. The words of the temporary

injunction "granted as prayed by the plaintiff" shows that no injunction was contemplated transcending the prayer of the complaint which did not pray an injunction against future meetings (See copy of Prayer in Appendix B).

Stockholder's suits are derivative in their nature and it is inconceivable that the corporation had any right either of itself or through a stockholder, to invoke the jurisdiction of a court to prohibit all future meetings of its stockholders. Such an order would lie beyond the prayer and the issues and the competence of the court. *Windsor* v. *McVeigh* (1876) 93 U. S. 274, 282 (23 L. Ed. 914, 917); *Standard Oil Co.* v. *Missouri ex rel. Hadley* (1912) 224 U. S. 270, 287 (56 L. Ed. 760, 770); *N. Y. Life Ins. Co.* v. *Dunlevy* (1916) 241 U. S. 518, 521, 522; *International Ins. Co.* v. *Silverman* (1923) 262 U. S. 346, 350, 351.

It can not be lightly presumed that the trial court decreed what would be an unique and unprecedented act, namely the partial paralysis of the corporate functions of the petitioner, virtually its corporate extinction; or that it either had power or intended to inhibit forever the performance of the statutory requirement of the annual election of the directors (Chap. 35, Sec. 12, p. 96, Ind. Acts 1921). Courts in Indiana have no power to dissolve corporations in whole or in part, in an injunction suit. *Allied Co.* v. *Little* (1926) 199 Ind. 166 (154 N. E. 480).

> "If any part of the record is ambiguous, it is the duty of this court to adopt that interpretation which tends to sustain the judgment." Ideal Cleaning Co. *v.* Mackowiak (1924) 83 Ind. App. 1, 15, 16 (143 N. E. 614).

This insistence that all future stockholders' meetings were interdicted was certainly only in the interest of the two Sales, the executive officers of the company prior to the stockholders' meeting of August 17, 1942. Such an inter-

pretation would be double assurance of their being perpetuated in office, by decree in case the judgment was affirmed, by restoration of their former majority control of the decree was reversed.

This petitioner urges that all these holdings are plainly untenable and are arbitrary pretext to avoid a decision in terms of the Federal question and that this appeal falls under the following cases: *Ward* v. *Love County* (1920) 253 U. S. 17, 22, 23 (64 L. Ed. 751, 758); *Lawrence* v. *State Tax Commission* (1931) 286 U. S. 276, 282, 283 (76 L. Ed. 1102, 1107) and cases there cited: *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.* (1916) 243 U. S. 157, 164 (61 L. Ed. 644, 649); *Leathe* v. *Thomas* (1907) 207 U. S. 93, 99 (52 L. Ed. 118, 120).

These questions are interwoven and intermingled with the presentation and determination of the constitutional questions in the court below and it is the proper province of this Court upon review to determine them:

> "But where the non-federal grounds is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. See Morgan *v.* Horsky, 178 U. S. 205, 208, 44 L. Ed. 1039, 20 Sup. Ct. Rep. 856; Creswill *v.* Grand Lodge K. P. 225 U. S. 246, 261; 56 L. Ed. 1074, 1080, 32 Sup. Ct. Rep. 822, Enterprise Irrigation District *v.* Farmers Mutual Canal Co., supra."
>
> "This court will review or independently determine all questions on which a federal right is necessarily dependent." U. S. *v.* Pink (1941) 315 U. S. 203, 217 (86 L. Ed. 796, 811) and cases there cited.

We note that in passing that counsel for the petitioner who entered special appearance and presented the motion to dismiss was selected by the officers of the corporation who were elected after appeal was taken. A certified cor-

porate record of their election was set out in the motion. This confirmed, at least, color of title. The judgment cancelling the stock of the Sales was then in full force and effect under the laws of Indiana.

That these newly elected officers were in actual possession of their offices and operating the properties of the corporation and that certain of the former officers had recognized them in several instances were set out in the pleadings of the petitioner and were not denied.

It is an axiom of Indiana Law that the title of office can not be tried in a collateral proceeding and that an officer with color of title and in possession is an officer *de facto*, whose actions are binding upon the corporation, private or public. *McGuirk* v. *State ex rel. Gottschalk*, 201 Ind. 650, 657, 659; *Creighton ex. rel. Farras* v. *Piper* (1860) 14 Ind. 182; *Spegal* v. *Krag-Reynolds Co.* (1898), 21 Ind. App. 205, 209 (51 N. E. 959); *Windsor* v. *McVeigh* (1876) 93 U. S. 274, 282 (23 L. Ed. 914, 917).

"An officer *de facto* has such title that his predecessor cannot claim a vacancy and demand the office" (*Quo warranto* case). *Rule* v. *State* (1935) 207 Ind. 546, 552; followed in *State ex rel. Johnson* v. *Clayton* (1937) 211 Ind. 327.

The other rulings of the Supreme Court of Indiana are to the following effect: The appointee of a mayor though not approved by the city counsel; *Rogers* v. *Calumet National Bank* (1938) 213 Ind. 576, 585 (12 N. E. (2d) 261); the officers of a private corporation may be *de facto; Smith* v. *Bank* (1862) 18 Ind. 327, 328; *Bradford* v. *The Frankfort St. Louis etc. R. Co.* (1895) 142 Ind. 383, 392, 393.

The court below did not profess to change the *de facto* doctrine established in Indiana, nor did it profess to change the rule that final judgment cancelling stock operated pending appeal.

The question of the authority of counsel for the petitioner is necessarily implicit in the presentation and determination of the constitutional questions and is not a mere non-Federal question and is reserved for the exclusive determination of this Court.

The court could not proceed to determine any issue in the absence of a party whose present was "necessary to the complete determination of the questions involved." *State of California* v. *Southern Pacific Co.* (1895) 157 U. S. 229, 251; (Section 2-222, BRS—1933) (Being Section 18, Act of 1852—Vol. 2 Rev. St. 1876, p. 39 construed in *Bittinger* v. *Bell* (1879) 65 Ind. 445, 452; *Trent* v. *Edmonds* (1904) 32 Ind. App. 432, 440; *Scobey* v. *Finton* (1872) 39 Ind. 275, 281; *Mahr* v. *Norwich* (1891) 172 N. Y. 471; *Halpin* v. *Savannah R. Co.* (—) 41 Fed. (2d) 329; *Bellaire* v. *B. & O. R. R. Co.* (—) 146 U. S. 16, 17. The cancellation of corporate stock and the enjoining of sale by the petitioner's corporate stock are integral issues not susceptible of division.

The issue of corporate stock can not be valid as to the stockholder and yet void as to the corporation or vice versa, likewise as to an injunction against its issue. Consequently the appeal was *coram non judice* and void under *Scott* v. *McNeal* (1894) 154 U. S. 34, 46.

It is no answer to say the Supreme Court would have passed on the merits to the same effect as the court did, even if the petitioner had been made a party.

In *Coe* v. *Armour Fertilizer Works* (1914) 237 U. S. 413, 424 (59 L. Ed. 1027, 1032) this Court said:

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in this particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Rees *v.* Watertown, 19 Wall. 107, 123 (22 L. Ed. 72, 77)."

For reference on the subject of the election of the newly chosen officers of the corporation, we note the following cases holding that the judgment is in force pending appeal so that the nullifying fact of the trial court's decree inhibited the voting thereof. These cases are: *Hawkins et al.* v. *State* (1891) 126 Ind. 294; *State ex rel. Matthews* v. *Chase* (1872) 41 Ind. 358; *Central Union Tel. Co.* v. *State* (1887) 110 Ind. 203 (10 N. E. 922—12 N. E. 136); *Febert* v. *Milk Control Board* (1936) 210 Ind. 283 (200 N. E. 688, 689 point (20-21) *Ex parte Meyer.* 102 N. Y. 606 (209 N. Y. 59).

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